



BRB Nos. 17-0312

ABDULRAOUF ABDELMEGED

Claimant-Petitioner

v.

GLOBAL LINGUIST SOLUTIONS,
L.L.C.

and

ZURICH AMERICAN INSURANCE
COMPANY

Employer/Carrier-
Respondents

DATE ISSUED: Feb. 14, 2018

DECISION and ORDER

Appeal of the Supplemental Order Approving Fees and Staying Payment of
Jonathan C. Calianos, Administrative Law Judge, United States Department
of Labor.

John S. Evangelisti, Denver, Colorado, for claimant.

Jonathan A. Tweedy, Michael T. Wawrzycki and Kelly F. Walsh (Brown
Sims), New Orleans, Louisiana, for employer/carrier.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Supplemental Order Approving Fees and Staying Payment
(2012-LDA-00654) of Administrative Law Judge Jonathan C. Calianos rendered on a
claim filed pursuant to the provisions of the Longshore and Harbor Workers'
Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base
Act, 42 U.S.C. §1651 *et seq.* (the Act). The amount of an attorney's fee award is
discretionary and will not be set aside unless shown by the challenging party to be

arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sought benefits for physical and psychological injuries he allegedly sustained while working for employer as a translator in Iraq between February 2008 and October 2009. In his decision dated March 19, 2014, the administrative law judge awarded claimant ongoing temporary total disability benefits for his work-related psychological condition commencing November 9, 2009. Employer appealed, and claimant cross-appealed, the administrative law judge's decision. BRB Nos. 14-0257/A. The Board vacated the administrative law judge's award of temporary total disability benefits from November 2009, and remanded the case for the administrative law judge to determine the onset date of claimant's work-related psychological disability. *Abdelmeged v. Global Linguist Solutions, LLC*, BRB No. 14-0257/A (Mar. 27, 2015) (unpub.) (Buzzard, J., concurring and dissenting).

The administrative law judge, in his decision on remand dated September 6, 2016, reinstated the previous award of ongoing temporary total disability benefits from November 9, 2009. Employer again appealed the award of temporary total disability benefits relating to claimant's psychological impairment. BRB No. 17-0001. The Board affirmed the administrative law judge's conclusion that claimant established he has been totally disabled since November 9, 2009, and thus, affirmed the administrative law judge's Decision and Order on Remand. *Abdelmeged v. Global Linguist Solutions, LLC*, BRB No. 17-0001 (Aug. 14, 2017) (unpub.). This decision has been appealed to the United States Court of Appeals for the Ninth Circuit.

Meanwhile, on April 14, 2014, claimant's counsel, who practices in Denver, Colorado, filed with the administrative law judge a fee petition for work performed from December 2, 2011 to April 14, 2014. Specifically, counsel sought an attorney's fee totaling \$115,436, representing 94.91 hours of his time at an hourly rate of \$350, 142.35 hours of an associate's time at an hourly rate of \$300, 153.95 hours of another associate's time at an hourly rate of \$225, 26.25 hours of paralegal time at an hourly rate of \$175, and \$6,537.15 in costs. Employer filed objections to the fee petition, and counsel filed a reply brief.

By Order dated June 3, 2014, the administrative law judge postponed the taking of any action on the fee petition until after the parties' appeals to the Board were resolved. Nevertheless, on September 24, 2014, the administrative law judge, with the parties' consent, held a telephone conference on the record to address counsel's fee petition and employer's objections thereto. During the conference, the administrative law judge detailed the parties' positions and then presented his findings regarding the hourly rates and the number of hours he would award counsel. Specifically, the administrative law judge stated he would award the following hourly rates: for counsel's work, \$300 from December 2, 2011 to July 24, 2013, and \$315 from July 25, 2013 to April 14, 2014; \$225

for all work performed by his associates; and \$90 for all paralegal work. Conference Transcript dated September 24, 2014 (CT I) at 26, 35. The administrative law judge further stated he would reduce counsel's hours by 12.6, *id.* at 37-42, 46-47, 49-51, 64, 81, 109-110, and his associates' hours by 4.8, *id.*, at 61, 63, 72, 114. The administrative law judge, however, refrained from entering an order awarding an attorney's fee due to the pending appeals in BRB Nos. 14-0257/A.¹ *Id.* at 119-120.

Following the issuance of the administrative law judge's decision on remand dated September 6, 2016, claimant's counsel, on October 17, 2016, filed a supplemental fee petition for work performed before the administrative law judge from April 17, 2014 to October 17, 2016. Counsel sought an additional fee totaling \$43,021, representing 119.96 hours of attorney time at an hourly rate of \$350, 1.75 hours of attorney time at an hourly rate of \$275, 1.1 hours of attorney time at an hourly rate of \$225, and 1.75 hours of paralegal time at an hourly rate of \$175. Employer filed objections to the fee petition, and counsel filed a reply brief, which included a request for an additional fee of \$1,085, representing 3.1 hours of work through January 6, 2017, at an hourly rate of \$350. After holding a second telephone conference on counsel's request for attorney's fees, Conference Transcript dated January 11, 2017 (CT II), the administrative law judge issued an order awarding attorney fees. In that order, the administrative law judge found, "for the reasons stated on the record during the [prior] hearing which are adopted and incorporated herein by reference," that counsel is entitled to an attorney's fee totaling \$34,749.65, payable by employer, for the period from April 17, 2014 through January 11, 2017. Supp. Order at 1. Specifically, the administrative law judge awarded counsel a fee for 102.76 hours at \$330 an hour, 2.85 hours of associate time at \$236 per hour, and 1.75 hours of paralegal time at \$95 per hour.

On appeal, claimant's counsel challenges the hourly rates awarded for attorney work.² Employer responds, urging affirmance of the administrative law judge's award of an attorney's fee. Counsel has filed a reply brief.

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a

¹Apparently, the administrative law judge has yet to issue any order relating to this fee petition and the corresponding 2014 telephone conference. *See e.g.*, Conference Transcript dated January 11, 2017 (CT II) at 4.

²The administrative law judge's award of a \$95 hourly rate for paralegal work and his findings regarding the number of compensable hours are affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court has also held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; *see also Kenny A.*, 559 U.S. at 551; *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

In this case, the administrative law judge, through the on-the-record conferences held on September 24, 2014, and January 11, 2017,³ accurately set out and addressed all of the evidence submitted by counsel in support of his requested hourly rates of \$350 for his work and \$275 and \$225 for the work performed by his associates. CT I at 6-36; CT II at 7-13. The administrative law judge adequately explained his reasons for according diminished weight to the Lopez, Mabry, Mullens, Chernushin, LaFond and Shakeshaft affidavits which counsel offered to support his requested hourly rates.⁴ He found that

³The September 24, 2014 conference was incorporated into the January 11, 2017 conference, and the administrative law judge's conclusions stated on the record in both conferences are incorporated into the administrative law judge's January 12, 2017 Supplemental Order, which is before us on appeal. *See* CT II at 8; Order at 1. The parties consented to, and actively participated in, both conferences. Specifically, at the September 24, 2014 conference, the parties agreed "to deal with the fee issue" presented by counsel's April 14, 2014 fee petition, CT I at 4, and moreover, consented that the transcript of that proceeding would "satisfy the writing requirement of the [Administrative Procedure Act, 5 U.S.C. §554] for purposes of any appeal of this matter regarding the awarded fees." *Id.* at 5 (emphasis added). Similarly, the parties agreed that the January 11, 2017 conference was for "determining the reasonableness of the hourly rates and the time expended" on counsel's October 17, 2016 fee petition. CT II at 4, 5. In light of this, we review the findings made by the administrative law judge during these conferences to determine whether they support his underlying award of an attorney's fee. 33 U.S.C. §921(b)(3) ("The Board's orders shall be based upon the hearing record."); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985). Accordingly, we reject counsel's contention that the findings stated on the record by the administrative law judge in the course of the September 24, 2014 conference are unenforceable because no order was issued after that 2014 conference.

⁴The administrative law judge found that, while Mr. Lopez or Ms. Mabry each generally provided historical hourly rates they received, i.e., \$175 (2003) and \$225

\$300 an hour is reasonable for work through July 24, 2013, as it is “supported by certainly [counsel’s] own affidavit that opines on what he’s charged in the past, what he currently charges, and it’s also supported in part by the Rhodes affidavit.” CT I at 25-26.⁵ However, the administrative law judge also found that this limited evidence “provided support that the market is probably above \$300 an hour” as of 2014, thus prompting him to state he would award counsel an hourly rate of \$315 for work from July 25, 2013 through April 14, 2014. CT I at 35. As the hourly rates approved at the 2014 conference, i.e., \$300 from December 2, 2011 to July 24, 2013, and \$315 from July 25, 2013 to April 14, 2014 for counsel’s work, and \$225 for all work performed by his associates, fall within the range of rates established by the evidence the administrative law judge deemed relevant, counsel has failed to establish that the administrative law judge abused his discretion in awarding the hourly rates. *See generally Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Consequently, we affirm the administrative law judge’s finding that \$315 and \$225 were the base hourly rates for attorney work commencing in April 2014.

We reject counsel’s contention that the administrative law judge erred by using the CPI-U to increase the base 2014 rate to 2017 rates. In order to account for delay, the fact-finder is not required to use any particular method; for example, he may adjust historical rates to reflect present value or may award the entire fee at current market rates. *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). Nonetheless, we cannot affirm the administrative law judge’s calculation in this case. It appears the administrative law judge did not utilize the CPI-U for the appropriate community in this case, Denver,

(2009) for Lopez and \$225 (no date given) for Mabry, neither one stated their current hourly rate for work (neither affidavit was dated). Additionally, the administrative law judge found that Mr. Mullens, Mr. Chernushin, and Mr. Shakeshaft did not provide sufficient information regarding their usual hourly rates. The administrative law judge further found that Mr. LaFond’s work involving employment discrimination law (90 percent of his case work) is not akin to the work performed by counsel in this case.

⁵In reaching this conclusion, the administrative law judge rationally relied on a fee statement accompanying the 2014 fee petition, signed by claimant, agreeing to a rate of \$300 per hour for counsel’s work. CT I at 30-32. The administrative law judge reasonably concluded that because of the fee agreement and the lack of any evidence, at the time of the 2014 conference, that claimant agreed to a change in that agreement, \$300 rather than \$350 per hour would be a “reasonable” starting point for counsel’s hourly rate as evidence of his then-current market rate. *Id.* at 32-33.

Colorado.⁶ *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT) (fact-finder must use evidence tailored to the relevant geographic market). Moreover, the percentage increase utilized, four and one-half percent, is not based on any evidence.⁷ *See* n. 6, *supra*. We, therefore, vacate the administrative law judge’s adjustment to \$330 and \$236 of the hourly rates for attorney work and remand the case for him to reconsider this issue and provide a specific explanation for his findings. CT I at 13-14, 15; CT II at 5-6; *see generally Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Modar v. Maritime Services Corp.*, 632 F. App’x 909, 49 BRBS 91(CRT) (9th Cir. 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014).⁸

⁶At the 2017 conference, the administrative law judge opted “to go down the same path” he did in *Brautigam v. Electric Boat Co.*, Case No. 2013-LHC-01658, a case arising in Connecticut, and “use, roughly, a CPI abatement,” to upwardly adjust counsel’s hourly rates to reflect current market rates. CT II at 12. The administrative law judge stated that, in *Brautigam*, “we had, roughly, almost an 8.7 percent increase adjustment in rates under the CPI.” *Id.* In this case, the administrative law judge stated, “I’m going to say a four and half percent increase to the rates set forth in 2014” *Id.*

⁷The CPI-U for the appropriate Denver-Boulder-Greeley, Colorado market, reveals an increase in the CPI-U from January 1, 2014 to January 1, 2017 of 6.9 percent. https://data.bls.gov/pdq/SurveyOutputServlet?data_tool=dropmap&series_id=CUURA433SA0,CUUSA433SA0 (Feb. 6, 2018).

⁸In *Modar*, the district director awarded a delay enhancement that, in 2012, awarded 2008 rates for services performed in 2004 and 2005, which the Board affirmed. *Modar*, 632 F. App’x at 909, 49 BRBS at 91-92(CRT). The Ninth Circuit vacated the Board’s affirmance and remanded the case, holding that it was erroneous to affirm an award that reflected neither current rates nor present value of historical rates. *Id.*

Accordingly, the administrative law judge's base hourly rate determinations for attorney work as of April 14, 2014, are affirmed. We vacate the administrative law judge's 4.5 percent increase to the 2014 attorney hourly rates, to \$330 and \$236, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Supplemental Order Approving Fees and Staying Payment is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge